

ORDER NO. 2207

UNITED STATES OF AMERICA  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Before Commissioners:

Ruth Y. Goldway, Chairman;  
Mark Acton, Vice Chairman; and  
Robert G. Taub

Rules Pursuant to 39 U.S.C. 404a

Docket No. RM2013-4

ORDER ESTABLISHING FINAL RULES PURSUANT TO 39 U.S.C. 404a

(Issued October 6, 2014)

I. INTRODUCTION

On June 5, 2013, the Commission issued a notice of proposed rulemaking to promulgate implementing regulations for 39 U.S.C. 404a.<sup>1</sup> Section 404a prohibits the Postal Service from certain anticompetitive behaviors, and permits any person to file a complaint with the Commission if that person believes the Postal Service has violated the section. Order No. 1739 contained proposals for both substantive rules relating to the standards by which complaints under section 404a are adjudicated and procedural rules accessible to only complaints that allege a violation of section 404a.

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<sup>1</sup> Notice of Proposed Rulemaking Establishing Rules Pursuant to 39 U.S.C. 404a, June 5, 2013 (Order No. 1739).

The Commission received comments and reply comments from: the Public Representative<sup>2</sup>, the Postal Service<sup>3</sup>, Stamps.com and Endicia (jointly)<sup>4</sup>, Valpak Direct Marketing Systems, Inc. and Valpak Dealers Association, Inc.<sup>5</sup>, and Time Inc.<sup>6</sup> Frederick Foster<sup>7</sup>, IDEAlliance<sup>8</sup>, United Parcel Service<sup>9</sup>, Pitney Bowes<sup>10</sup>, Valassis Direct Mail<sup>11</sup>, National Association of Presort Mailers<sup>12</sup> and Grayhair Software, Inc.<sup>13</sup> only filed initial comments. The Newspaper Association of America only filed reply comments.<sup>14</sup>

Overall the rules relating to the substantive implementation of section 404a were significantly less controversial than those creating procedures applicable only for 404a complaints. The Commission finds it appropriate to bifurcate action on the proposed

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<sup>2</sup> Public Representative Comments, July 29, 2013 (PR Comments), Public Representative Reply Comments, August 28, 2013 (PR Reply Comments).

<sup>3</sup> Initial Comments of the United States Postal Service, July 29, 2013 (Postal Service Comments), Reply Comments of the United States Postal Service, August 28, 2013 (Postal Service Reply Comments).

<sup>4</sup> Joint Comments of Stamps.com and Endicia, July 29, 2013 (Stamps.com and Endicia Comments), Joint Reply Comments of Stamps.com and Endicia, August 28, 2013 (Stamps.com and Endicia Reply Comments).

<sup>5</sup> Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Initial Comments on Notice of Proposed Rulemaking, July 29, 2013 (Valpak Comments), Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Reply Comments on Notice of Proposed Rulemaking, August 28, 2013 (Valpak Reply Comments).

<sup>6</sup> Comments of Time Inc. in Response to Order No. 1739, July 29, 2013 (Time Comments), Reply Comments of Time Inc. Regarding Order No. 1739 (Time Reply Comments). Concurrent with its reply comments, Time Inc. filed a "Motion of Time Inc. for Acceptance of Late Filing" on August 29, 2013. That motion is granted.

<sup>7</sup> Frederick Foster's Opinion on the PRC Notice of Proposed Rulemaking Establishing Rules Pursuant to 39 U.S.C. 404a, July 19, 2013 (Foster Comments).

<sup>8</sup> Initial Comments of the International Digital Enterprise Alliance, Inc. (IDEAlliance), July 29, 2013 (IDEAlliance Comments).

<sup>9</sup> Initial Comments of United Parcel Service in Response to Notice of Proposed Rulemaking Establishing Rules Pursuant to 39 U.S.C. 404a, July 29, 2013 (UPS Comments).

<sup>10</sup> Comments of Pitney Bowes, Inc., July 29, 2013 (Pitney Bowes Comments).

<sup>11</sup> Valassis Direct Mail, Inc., July 29, 2013 (Valassis Comments).

<sup>12</sup> Comments of the National Association of Presort Mailers, July 29, 2013 (NAPM Comments).

<sup>13</sup> Comments of Grayhair Software, Inc., July 29, 2013 (Grayhair Software Comments).

<sup>14</sup> Reply Comments of the Newspaper Association of America, August 28, 2013 (NAA Reply Comments).

rules. Pursuant to 39 U.S.C. 404a(b), this Order adopts substantive rules relating to the implementation of section 404a, but defers consideration of procedural rules to later proceedings. The Commission plans consideration of changes to the procedural rules governing all complaints before the Commission, and has determined that it is not appropriate at this time to create procedural rules only applicable to complaints alleging Postal Service violations of section 404a. As such, the Commission does not offer final rules for 39 CFR part 3032 subpart C, nor part 3033 accelerated procedures for complaints alleging violations of 39 U.S.C. 404a.

The remainder of this Order is comprised of two sections. The first identifies each substantive rule to be implemented and discusses any issues or comments. The second provides a section-by-section analysis of the final rules with a description of any changes from the proposed rules. The full text of the final rules is set forth below.

## II. SUBSTANTIVE RULES

In this section, each substantive rule that will be finalized is identified, briefly outlined, and comments or issues relating to the rule are discussed and analyzed.

### A. Rule 3032.1 Applicability

Proposed rule 3032.1 identifies how the standards and rules that follow in part 3032 are applied. Specifically, it states that complaint proceedings filed under 39 U.S.C. 3662 for alleged Postal Service violations of 39 U.S.C. 404a are governed by the substantive standards set forth in part 3032.

No comments address proposed rule 3032.1. However, the Commission implements several changes to the proposed rule because the proposed rule covers both the substantive standards appearing in subpart B of part 3032, as well as the procedural rules appearing in subpart C of part 3032 and all of part 3033. The final rule removes references to those procedural rules.

## B. Rule 3032.5 Unfair Competition

Proposed rule 3032.5 implements section 404a(a)(1). It lists the elements that a complainant must show to bring a complaint that the Postal Service has violated 39 U.S.C. 404a(a)(1). Specifically, a valid complaint requires that the Postal Service have a rule, regulation, or standard that precludes competition or establishes the terms of the competition. It further requires that the rule, regulation, or standard harms or harmed the person filing the complaint and competition. The rule offers an affirmative defense available to the Postal Service, namely that it may demonstrate the rule at issue does not create an unfair competitive advantage for itself or any entity it funds. Finally, the rule defines terms (rule, regulation, or standard) to include other actions or edicts issued by the Postal Service that have the effect of a rule, regulation, or standard. At the outset, the Public Representative notes that the title of the rule is not clear. Public Representative Comments at 5, n.5. Unfair Competition is a broader concept than the rule itself. Therefore, the Commission finds it appropriate to alter the title of the rule (from Unfair Competition to Postal Service Rules that Create an Unfair Competitive Advantage). Comments address five specific aspects of proposed rule 3032.5.

### 1. Harm requirement in 3032.5(a)(2)

Proposed 3032.5(a)(2) requires that the Postal Service's action harms or harmed the person filing the complaint and competition. United Parcel Service objects to the inclusion of this harm requirement because that requirement is not present in the statute. UPS Comments at 5 (The rule would add elements to the complainant's burden that are not currently in the statute.). See *also* Public Representative Reply Comments at 9, Stamps.com and Endicia Reply Comments at 2, NAA Reply Comments at 5. Pitney Bowes contends that the proposed harm requirement shifts the burden improperly away from the Postal Service to demonstrate that the rule or regulation does not cause harm, and is therefore inconsistent with the plain language of the statute. Pitney Bowes Comments at 2.

United Parcel Service also notes that reading a requirement of harm into the rule makes the rule analogous to other antitrust and unfair competition standards that the Postal Service is already subject to by virtue of 39 U.S.C. 409(e). UPS Comments at 5.

The Postal Service supports the inclusion of the harm requirement as a reasonable interpretation of the statute and consistent with the legal concept of standing. Postal Service Reply Comments at 5-7. The Postal Service contends that the requirement to show harm would limit the number of claims that would waste time because no party has suffered, nor ever would suffer, any harm. *Id.* at 7. Time, Inc. contends that the harm requirement should be read as purely jurisdictional, and could be broadened to include associations or representative bodies of those harmed. Time Reply Comments at 8. Time, Inc. comments that the harm to competition requirement should be read to mean that complainant must show how the Postal Service's action precluded competition or established the terms of competition. *Id.* at 8-9.

The Commission agrees with the comments that point out the harm requirement is not present in the statute. The Commission removes the harm requirement as a jurisdictional element that complainants must demonstrate to proceed under the rules. Harm may remain a relevant part of a complaint alleging a violation of 39 U.S.C. 404a(a)(1), and could be used to show how the Postal Service has established the terms of competition or precluded competition. It could also be used in the Commission's consideration of an appropriate remedy should a complaint be sustained.

The Commission finds that the benefits of keeping the harm requirement, as articulated by the Postal Service, are outweighed by the extra-statutory restrictions it would impose upon complainants. The final rule, therefore, does not contain a requirement that the complainant demonstrate harm to himself and competition.

## 2. Affirmative defense in 3032.5(b)

Proposed 3032.5(b) offers the Postal Service an affirmative defense that no violation has occurred when the Postal Service can demonstrate that the rule, regulation or standard does not create an unfair competitive advantage for itself or any entity

funded, in whole or part, by it. The Public Representative proposes that the defense should be rebuttable rather than affirmative. Public Representative Comments at 5. This would mean that even if the Postal Service shows that there is a regulatory justification for the rule subject to a 404a complaint, it could nonetheless be found in violation of 404a if anticompetitive harm outweighs the regulatory justification. *Id.* at 7-8. The Public Representative contends that this burden-shifting framework is used in antitrust litigation under the Sherman Antitrust Act of 1890 when applying the rule-of-reason analysis. *Id.* at 6-7. Stamps.com and Endicia support the Public Representative's suggestion. Stamps.com and Endicia Reply Comments at 4-5.

The Postal Service opposes the rebranding of its defense as rebuttable. The Postal Service characterizes this proposed change as importing principles of antitrust law that were not envisioned by Congress when section 404a was enacted. Postal Service Reply Comments at 22.

The Commission is sympathetic to the arguments of the Public Representative and Stamps.com and Endicia, but the framework of section 404a is clear in its construction. The statute unequivocally states that the Postal Service is prohibited from certain behavior unless a condition is present. Put another way, if that condition is present, the Postal Service is not prohibited from that certain behavior.

The Commission finds it appropriate to maintain the rule as constructed, as it better reflects the language and intent of the statute. The principles used under other laws to evaluate unfair competition are instructive and useful as reasoned analysis, but cannot be relied upon to change the plain meaning of the controlling law. Congress enacted section 404a(a)(1) using substantially different language than the Sherman Act.<sup>15</sup> If Congress intended for the Commission to use the entire rule-of-reason analysis to evaluate 404a(a)(1) complaints, it likely would have used language similar to the Sherman Act language in formulating section 404a(a)(1).

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<sup>15</sup> 15 U.S.C. 1-38.

### 3. Rule, regulation or standard definition

Proposed 3032.5(c) broadly defines rule, regulation, or standard to include other edicts by the Postal Service that may have the effect of a rule, but without a title identifying it as such. The Postal Service contends that the definition is too broad, ambiguous, and should rather refer to the Postal Service's own definition of its rules in the Code of Federal Regulations. Postal Service Comments at 5-6. The Postal Service comments that the proposed definition "could be argued to have no boundaries" and would expand the Postal Service's potential liability. *Id.* at 6.

Stamps.com and Endicia, Pitney Bowes, the Public Representative, United Parcel Service, and Newspaper Association of America counter that the broad definition is necessary to avoid the Postal Service's ability to play semantics. Stamps.com and Endicia Comments at 3-4, Pitney Bowes Comments at 6, Public Representative Comments at 10, UPS Comments at 4, NAA Reply Comments at 7.

The Commission does not find it appropriate to limit the jurisdiction of complaints brought under 404a(a)(1) to the Postal Service's definition of its rules, regulations, or standards. As several commenters point out, the Postal Service is able to take action, as a regulator, without formally announcing its intent as a rule, regulation, or standard. Stamps.com and Endicia Comments at 3-4, UPS Comments at 4, NAA Reply Comments at 6-7. The Postal Service could also amend its definition through its rulemaking authority.

The Commission finds that the uncertainty introduced by leaving the definition of rule, regulation, or standard open to action that has the effect of regulation without the title is not limitless as characterized by the Postal Service. Rather, it allows the Commission to review the facts and circumstances when a complainant believes the Postal Service has acted in its capacity as a regulator and violated the statute.

### 4. Passive violations of 404a(a)(1)

The Public Representative and Stamps.com and Endicia suggest that complainants be able to pursue a 404a(a)(1) violation for a passive violation, where the

Postal Service, by competing in a market, has established the terms of competition. Public Representative Comments at 10. Stamps.com and Endicia agree with the Public Representative and comment that the Postal Service entering a market that it also regulates could have the effect of precluding competition or establishing the terms of competition. Stamps.com and Endicia Reply Comments at 5.

The Postal Service comments that allowing a complaint to proceed merely on the basis that the Postal Service has entered a market, and not more, would unlawfully expand the scope of section 404a(a)(1). Postal Service Reply Comments at 26. The Postal Service notes that other laws and regulations govern its activity in other spheres. *Id.*

The Commission notes that both section 404a(a)(1) and proposed rule 3032.5 have no requirement as to the timing of the Postal Service's rule versus its competing in a market. If the Postal Service enters a market, and existing rules coupled with that entry mean that the Postal Service has now precluded competition or established the terms of competition, the existing framework does not foreclose a complaint. If the Postal Service does not, however, have any rule, regulation or standard that applies, and enters a market, it is not possible for it to violate section 404a(a)(1). The Postal Service is correct that merely competing, without an applicable rule, regulation, or standard, cannot form the basis of a 404a(a)(1) complaint. The plain reading of the terms of 404a(a)(1) requires the Postal Service to "preclude competition or establish the terms of competition" with its establishment of a rule or regulation.

##### 5. *Per se* violations of 404a(a)(1)

Grayhair Software and Pitney Bowes encourage the Commission to specifically identify, in its substantive rules, actions by the Postal Service that would, by their nature, be anticompetitive and in violation of rule 3032.5. Grayhair Software Comments at 17-18 (Grayhair advocates a new rulemaking to consider specific guidance on standards regarding competitive foreclosure.). Pitney Bowes Comments at 5. Pitney Bowes provides an example of a product or service with a non-zero cost being offered



for free as what could be termed a *per se* violation of the rule. *Id.* Stamps.com and Endicia agree that the rules would be improved by offering guidance on Postal Service actions that would constitute *per se* violations. Stamps.com and Endicia Reply Comments at 2.

The Postal Service opposes the Commission defining *per se* violations of the rule. Postal Service Reply Comments at 2. It notes the general move away from *per se* analysis in the antitrust law context, and that the availability of greater economic and market expertise has made for more nuanced analysis and adjudication. *Id.* at 2-4. The Public Representative also comments that *per se* declarations of prohibited conduct would be inappropriate. Public Representative Reply Comments at 11-12. The Public Representative notes the general disadvantages in offering declaratory judgments, where the facts of an individual case are not considered. *Id.* at 12.

At this juncture, especially given that there have been no complaints adjudicated that have alleged a violation of 39 U.S.C. 404a, the Commission finds insufficient information exists in the record to determine what specific actions by the Postal Service would constitute a violation of section 404a(a)(1).

#### C. Rule 3032.6 Disclosure, Transfer, and Licensing of Intellectual Property

Proposed rule 3032.6 implements section 404a(a)(2), which prohibits the Postal Service from compelling or attempting to compel the disclosure, transfer, or licensing of intellectual property from the complainant to a third party. No comments address proposed rule 3032.6, and there are no revisions to the proposed rule.

#### D. Rule 3032.7 Unlawfully Obtaining Information

Proposed rule 3032.7 implements section 404a(a)(3), which prohibits the Postal Service from obtaining information from a party and later offer a product or service based on that information, unless the Postal Service has consent of the party or obtained (or could have obtained) the information from another source. Two aspects of proposed rule 3032.7 were addressed in the comments.

1. Provided or sought to provide to the Postal Service

Stamps.com and Endicia comment that a party need only to provide or seek to provide a product, and that it need not be directed at the Postal Service. Stamps.com and Endicia Comments at 5-6. Stamps.com and Endicia contend that a product could be offered to the public, and the Postal Service could obtain information from the complainant through other submissions, approvals, or concurrence. *Id.* at 6. Stamps.com and Endicia comment that this revision conforms more closely to the language of 404a(a)(3). *Id.* at 5.

The Postal Service counters that the intent of the statute is to protect parties in negotiation with the Postal Service, and it need not be extended beyond that scope. Postal Service Reply Comments at 32-33. The Postal Service contends that section 404a(a)(3) aims to protect confidential information shared with the Postal Service pursuant to a business relationship, and therefore should not apply outside the context of that relationship. *Id.* at 32.

The Commission finds that Stamps.com and Endicia's suggested revision is in keeping with the language of the statute, and amends the final rule.

It may be difficult to envision a circumstance where the Postal Service would procure such confidential information outside the scope of an offering by the complainant, but that difficulty does not place the circumstance out of the realm of possibility. The Postal Service remains protected from a broad expanse of the rule by other requirements of the rule. Rule 3032.7(a)(2) requires the Postal Service to have obtained the information from the complainant, and 3032.7(b) and (c) give the Postal Service the ability to defend the acquisition by showing availability from other sources or provision by consent.

2. Informed consent

The Postal Service objects to the Commission's linking of the District of Columbia's Rules for Professional Conduct to the rule 3032.7 definition of informed consent. Postal Service Comments at 20. The Postal Service comments that the

professional conduct rule was designed to apply to the attorney-client relationship, which is inapplicable to transaction negotiations as envisioned under section 404a. *Id.* at 20-21. Notwithstanding those specific objections, the Postal Service also opposes all the requirements concerning consent in proposed rule 3032.7 because the Postal Service believes the requirements are based on a faulty assumption – that there is inequality of bargaining power between the Postal Service and its business partners. *Id.* at 21. The Postal Service contends that these requirements concerning consent would interfere with the Postal Service’s ability to conduct business.

Stamps.com and Endicia reply that it is unclear what about the nature of informed consent would interfere with the Postal Service’s ability to do business. Stamps.com and Endicia Reply Comments at 4.

The Public Representative replies that if the Postal Service is to rely on consent to defeat an allegation that it unlawfully appropriated intellectual property, that consent should be informed and uncoerced. Public Representative Reply Comments at 10. However, the Public Representative also agrees with the Postal Service that it should not have to make “an affirmative prior communication explaining the risks of providing consent” because it would be tantamount to treating business partners as fiduciaries. *Id.*

The Commission’s intent with requiring informed consent in its proposed rules was to require the Postal Service to demonstrate more than a party’s signature on a form presented as a requirement before the Postal Service will enter negotiations. See Order No. 1789 at 16. A long-held tenet of tort law is that where a party consents a claim of conversion will not lie.<sup>16</sup> Similarly, if a party consents to the Postal Service’s taking of its intellectual property, a claim the Postal Service violated section 404a(a)(3) cannot be sustained. Because the harm to an individual in losing rights to intellectual property can be great, the Commission sought to protect that interest.

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<sup>16</sup> See, e.g., *Tousley v. Board of Education*, 40 N.W. 509 (Minn. 1888).

However, the Commission agrees with the Postal Service and the Public Representative that the heightened duty articulated in rule 3032.7 is more than would be necessary to protect that interest. The Commission finds that the standard for consent, to justify the taking of intellectual property is not informed and uncoerced consent but rather the traditional common law notion of consent with a minor modification.<sup>17</sup> To attempt to mitigate the potential harm to an individual losing his or her rights to intellectual property, the Commission will require consent to be written rather than implied for instances where the Postal Service claims consent as a defense pursuant to 3032.7.

The Commission will examine evidence that the complainant consented in writing to the taking of its intellectual property under rule 3032.7 in light of the traditional common law notion of consent, and make a determination based on the preponderance of the evidence whether complainant consented to the taking.

The final rule will not include a requirement that the Postal Service has communicated adequate information and explanation about the risks of providing such consent. The Commission agrees with the Postal Service and the Public Representative that such a requirement, as used in evaluating legal representation agreements, is not appropriate to use in evaluating informed consent between the Postal Service and a contracting partner. By omitting this language, the Commission does not require the Postal Service to act in an advisory capacity to its contracting partners when it obtains consent.

A requirement that a party provide written consent to the Postal Service's taking of its intellectual property strikes an appropriate balance between the need to protect an individual's property rights and avoid undue burden to the Postal Service.

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<sup>17</sup> See *American Jurisprudence*, § 104 Conversion. Consent is a complete defense to a claim of conversion. See, e.g., *Bank of New York v. Fremont General Corp.*, 523 F.3d 902, 914 (C.A.9 (Cal.), 2008). There can be no action for conversion where the dispossessed party consented to the taking of the property. The Commission notes that using the term uncoerced is duplicative as consent by its nature is voluntary.

#### E. Rule 3032.8 Statutorily Authorized Affirmative Defense

Proposed rule 3032.8 sets forth that the Postal Service may offer, as an affirmative defense to any alleged violation of section 404a, that it is specifically authorized by law to take such action (or inaction) that is alleged to be in violation of the section. Subsection (b) states that the Postal Service may not use its general or specific authority (enumerated in 39 U.S.C. 401 and 404) to form the basis of an affirmative defense.

The Postal Service comments that the rule is not tenable, because it precludes the Postal Service from using its authority to act. Postal Service Comments at 15. The Postal Service gives an example of using its eminent domain authority over intellectual property. *Id.* at 16.

Pitney Bowes, as well as Stamps.com and Endicia, comment that section 404a would be meaningless if the Postal Service could justify its actions based on its general and specific authority alone. Pitney Bowes Comments at 5, Stamps.com and Endicia Reply Comments at 3-4.

Authority for all Postal Service action is derived from its general or specific authority that is set forth in 39 U.S.C. 401 and 404. The Commission does not read the proposed rule 3032.8 to foreclose the Postal Service's ability to execute its general or specific authority as authorized by those sections. Action by the Postal Service pursuant to either of those sections is limited by and subject to 39 U.S.C. 404a, as both the Postal Service and other commenters point out. There appears to be a misunderstanding, however, in the construction of rule 3032.8.

The Postal Service, under the current iteration of the rule, is not precluded from offering its statutory authority in sections 401 or 404 as a justification for any action it may take. It is only prohibited from offering, as the basis of an affirmative defense, its general or specific authority. The Postal Service uses the example of its specific authority to exercise eminent domain, and contends that it could use that authority over intellectual property. Rule 3032.8 does not preclude the Postal Service's use of its eminent domain authority. The rule makes clear that such authority is subject to the

limitations imposed by section 404a. Rule 3032.8(c) clarifies that the Postal Service is not precluded from arguing that its use of its eminent domain authority does not have the requisite effect to violate section 404a(a).

The rule is only meant to convey that both sections 401 and 404 are subject to the limitations of 404a and therefore unavailable as the basis for an affirmative defense of an alleged violation of 404a. Based on that understanding and interpretation, the Commission does not find it necessary to amend rule 3032.8.

#### F. General Substantive Comments

Several comments are more general, and though related to the substantive rules, are not tied to a specific proposed rule.

Frederick Foster comments that the Commission should not administer 404a complaints, but rather should investigate allegations and report such results to the United States District Court. Foster Comments at 1-4. Title 39, section 404a(c), however, unequivocally confers the rights of any party to bring a complaint to the Commission on the basis of an alleged Postal Service violation of section 404a.

Pitney Bowes comments that the Commission should take a broad view of its authority in enforcing anticompetitive practices, beyond 404a, and gives the example of workshare discounts that pass through less than 100 percent of costs avoided. Pitney Bowes Comments at 8. The Commission notes that the review of workshare discount pricing, as acknowledged by Pitney Bowes, appears to extend beyond the Commission's section 404a responsibilities. However, the Commission does not make a determination as to the scope of section 404a vis-à-vis workshare discount pricing to avoid prejudicing any particular complaint where such issues may arise.

The Newspaper Association of America cautions that the Commission should not import any principles of antitrust law or unfair competition, but rather should use 404a as a check on a government entity's monopoly power. The Commission's aim in developing rules implementing 404a is to follow Congressional intent as enacted. The Commission's reference to anticompetitive principles is meant as guidance for the

Commission and parties as to relevant lines of inquiry, not as any replacement of the statutory intent of section 404a.

### III. SECTION-BY-SECTION ANALYSIS

This section sets forth the title of each final rule adopted by this Order, and any changes, to the rule from the proposed rule. The discussion of the comments and basis for those changes appears in the preceding section.

*Rule 3032.1 Applicability.* This rule contains provisions relating both to the substantive rules and procedural rules, only those parts of the rule relevant to the substantive rules remain. Those rules relating to the procedural rules are modified or removed.

Specifically, 3032.1(a)(2) and (b) are struck. Rule 3032.1(c) is modified by removing references to part 3033 and Subpart C.

*Rule 30302.5 Postal Service rules that create an unfair competitive advantage.* The title of this rule is amended. The harm requirement articulated in 3032.5(a)(2) is removed. The remainder of the rule is adopted.

*Rule 3032.6 Disclosure, transfer and licensing of intellectual property.* No comments address this rule, and there are no changes from the proposed rule to the final rule.

*Rule 3032.7 Unlawfully obtaining information.* Rule 3032.7(a)(1) is modified by removing the words—to the Postal Service. Rule 3032.7(c) is modified by removing the words—and given only after the Postal Service has communicated adequate information and explanation about the risks of providing such consent, and adding the word written before consent. Rule 3032.7(c) is also modified by removing the last line referencing informed and uncoerced consent.

*Rule 3032.8 Statutorily authorized affirmative defense.* This rule is adopted without change from the proposed rule.

#### IV. ORDERING PARAGRAPHS

*It is ordered:*

1. Part 3032 of title 39, Code of Federal Regulations, is revised as set forth below the signature of this Order, effective 30 days after publication in the *Federal Register*.
2. The Secretary shall arrange for publication of this Order in the *Federal Register*.

#### **List of Subjects**

##### **39 CFR Part 3032**

Administrative practice and procedure; Postal Service; Trademarks.

For the reasons discussed in the preamble, the Commission amends chapter III of title 39 of the Code of Federal Regulations as follows:

1. Add part 3032 to read as follows:

#### **PART 3032—SPECIAL RULES FOR COMPLAINTS ALLEGING VIOLATIONS OF**

##### **39 U.S.C. 404a**

##### **Subpart A—General**

Sec.

3032.1 Applicability.

3032.2–3032.4 [Reserved]

##### **Subpart B—Requirements and Defenses**



3032.5 Postal Service rules that create an unfair competitive advantage.

3032.6 Disclosure, transfer, and licensing of intellectual property.

3032.7 Unlawfully obtaining information.

3032.8 Statutorily authorized affirmative defense.

**Authority:** 39 U.S.C. 404a; 3662.

## **Subpart A—General**

### **§ 3032.1 Applicability.**

The rules in this part govern proceedings filed under 39 U.S.C. 3662 alleging violations of 39 U.S.C. 404a that meet the requirements of §§ 3030.2 and 3030.10 of this chapter.

### **§§ 3032.2–3032.4 [Reserved]**

## **Subpart B—Requirements and Defenses**

### **§ 3032.5 Postal Service rules that create an unfair competitive advantage.**

(a) A complaint alleging a violation of 39 U.S.C. 404a(a)(1) must show that:

(1) A Postal Service rule, regulation, or standard has the effect of:

(i) Precluding competition; or

(ii) Establishing the terms of competition; and

(b) As an affirmative defense to a complaint under 39 U.S.C. 404a(a)(1), the Postal Service may demonstrate that the rule, regulation, or standard at issue does not create an unfair competitive advantage for itself or any entity funded, in whole or in part, by the Postal Service.

(c) As used in this section, the term “rule, regulation, or standard” includes, among other things, documents or policies issued by the Postal Service to exercise its regulatory authority or otherwise act as a governmental entity.

**§ 3032.6 Disclosure, transfer, and licensing of intellectual property.**

(a) A complaint alleging a violation of 39 U.S.C. 404a(a)(2) must show that the Postal Service has compelled or attempted to compel the disclosure, transfer, or licensing of the intellectual property of the person filing the complaint to a third party.

(b) As used in this section, the term “intellectual property” includes, among other things, patents, copyrights, trademarks, trade secrets, and proprietary information.

(c) As used in this section, the term “disclosure, transfer, or licensing of intellectual property” includes, among other things, an action that has an adverse effect on the value of intellectual property.

**§ 3032.7 Unlawfully obtaining information.**

(a) A complaint alleging a violation of 39 U.S.C. 404a(a)(3) must show that:

(1) The person filing the complaint has provided or sought to provide a product;

(2) The Postal Service obtained information about such product from the person filing the complaint; and

(3) The Postal Service offers or offered a postal service that uses or is based, in whole or in part, on the information obtained from the person filing the complaint.

(b) As an affirmative defense to a complaint under 39 U.S.C. 404a(a)(3), the Postal Service may demonstrate that substantially the same information was obtained

(or was obtainable) from an independent source or is otherwise obtained (or obtainable) through lawful means.

(c) As an affirmative defense to a complaint under 39 U.S.C. 404a(a)(3), the Postal Service may show that the information obtained was provided by written consent.

**§ 3032.8 Statutorily authorized affirmative defense.**

(a) As an affirmative defense to an allegation of a violation of 39 U.S.C. 404a(a), the Postal Service may demonstrate that it is specifically authorized by law to take the action or inaction alleged to be a violation of that section.

(b) Authority under 39 U.S.C. 401 or 39 U.S.C. 404 may not form the basis of an affirmative defense under paragraph (a) of this section.

(c) Paragraph (b) of this section does not preclude the Postal Service from arguing that a particular Postal Service regulation or other action (or inaction) does not have the requisite effect to violate 39 U.S.C. 404a(a).

By the Commission.

Ruth Ann Abrams  
Acting Secretary